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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ROSEMARY ANDERSON et al., Plaintiffs and Appellants, v. TOTAL RENAL CARE, INC., Defendant and Respondent.	B236207 (Los Angeles County Super. Ct. No. BC388335)

APPEAL from an order of the Superior Court of Los Angeles County, Daniel J. Buckley, Judge. Affirmed in part, and reversed and remanded in part.

Kingsley & Kingsley, Eric B. Kingsley and Kelsey M. Peterson-More for Plaintiffs and Appellants.

Epstein, Becker & Green, James A. Goodman, Marisa S. Ratinoff, Tae Kim and Amy B. Messigian for Defendant and Respondent.

Appellants, Rosemary Anderson and Richard Brown, appeal from the trial court's order denying their motion to certify a number of classes of employees allegedly injured by respondent Total Renal Care's employment policies and practices. Appellants alleged that respondent violated California wage and hour laws and failed to issue paychecks in compliance with Labor Code section 212. Below, appellants specifically sought to certify three classes: (1) employees who were not given a "meal break," (2) employees whose paychecks failed to comply with Labor Code section 212, and (3) employees who were required to take their meal break early in the first hour of their shift. As we shall explain, the court did not err in failing to certify classes related to the meal period claims based on the court's finding that individual matters predominated the determination of these claims. Nor do we find that remand is required in light of *Brinker Restaurant Corporation v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*). However, we reverse the court's denial of the class certification motion concerning the Labor Code section 212 paycheck claim. It appears that the court failed to specifically rule on that claim, and it is sufficiently distinct from the other claims that we cannot infer a ruling on it based on the court's orders. Consequently we remand the matter for reconsideration.

FACTUAL BACKGROUND

Appellants Rosemary Anderson and Richard Brown were employed by respondent Total Renal Care, Inc., and worked as acute dialysis nurses (AD nurses). Total Renal Care is one of the largest providers of acute dialysis treatment in California and provides dialysis treatment in 15 regional programs across the state. The majority of AD nurses are mobile acute nurses who travel to various hospitals to provide dialysis treatment to patients at those hospitals. AD nurses work alone when performing dialysis treatment and generally perform two to three dialysis treatments per shift.

A typical treatment performed by an AD nurse is a hemodialysis treatment (HD treatment). The entire treatment, including set up and take down, takes approximately five hours to complete, while the actual treatment itself takes approximately 3 hours. The company's employee handbook indicates that employees are entitled to take an uninterrupted 30 minute break. Although there is no written policy governing at what

point during a session a nurse should take his or her 30 minute lunch break, there are typically four opportunities for a nurse to take his or her break during a dialysis session: (1) after clocking in and retrieving the equipment, (2) after taking the equipment to the patient's room, (3) after completing the set up process, or (4) after completing the first treatment before breakdown. The declarations of nurses in the record indicate that AD nurses took their meal period at different times during the day, typically in their first or fifth hour of work.

Employees of respondent are issued paychecks drawn on an out-of-state bank. Respondent issued two different paper paychecks during the class period, neither of which contained a bank with a California address.

PROCEDURAL BACKGROUND

Appellants' operative complaint alleged that respondent violated California wage and hour and unfair competition statutes including: (1) failure to provide meal breaks, (2) failure to pay wages, (3) failure to provide paychecks in compliance with Labor Code section 212, (4) penalties pursuant to Labor Code section 203 and section 2699, and (5) unfair competition. The complaint alleged that the named plaintiffs intended to represent two classes: (1) the Missed Meal Period Class (Meal Period Class), (2) the Labor Code section 212 Paycheck Class (Section 212 Class).

Appellants defined the "Meal Period Class" as "[a]ll persons who were employed or have been employed, and who have worked one or more shifts that exceeded five hours as an acute nurse for [Respondent] in the State of California between April 1, 2004 and the date of trial.…" Appellants described the "Meal Period Class" as including AD nurses who were required to work more than five hours without receiving a meal period. The thrust of the appellants' argument was that respondent had a policy of understaffing, which precluded AD nurses from effectively taking their meal periods.[1] Furthermore,

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[1] Appellants asserted: "[Total Renal Center]'s failure to provide meal breaks stems from its common policy of chronically understaffing AD nurses at contracting facilities with high-volume patient demand."

appellants claim that this class had wages automatically deducted from their paychecks for meal periods and AD nurses were therefore not compensated for these lost meal periods ("Auto deduction/unpaid wages claim").

The "Section 212 Class" was defined as "[a]ll persons who are employed or have been employed by [Respondent], in the State of California, between April 1, 2004 and the date of trial who have received payments of wages from the [Respondent] in the form of checks issued by an out-of-state bank with no in-state address for presentation on one or more occasion." Appellants described this class as all employees who were paid wages in the form of checks by an out-of-state bank and who had to pay a fee to cash their check or had a hold imposed on the check.

Respondent opposed appellants' "Meal Period Class" by presenting evidence that there was no understaffing policy and that individual issues predominated. Respondent presented declarations from AD nurses who stated that they were able to take their meal periods and were advised to do so in compliance with the Labor Code. Additionally, respondent provided evidence that AD nurses had the discretion to take their meal breaks throughout their shifts and any failure to take a meal break was the result of the individual nurses' scheduling and not a company policy. Further, respondent presented evidence that there was no company-wide auto-deduction of wages and that this practice was limited to employees at one hospital.

Respondent opposed appellants' "Section 212 Class" on the grounds that both Rosemary Anderson and Richard Brown could not represent this class since both were paid via direct deposit and therefore were never issued a paycheck in violation of Labor Code 212. In addition, respondent argued that individual issues predominate, since damages would need to be determined according to every class member's bank or check cashing establishment.

In appellants' reply brief, they asked the court to certify a third class, the "Early Lunching Class." Appellants defined this class as those employees who had taken a meal period before the first patient dialysis treatment of a shift. In addition, in a footnote in the Reply they also asserted that the court should recognize a subclass of the meal period

class based on a claim that from between April 2004 through October 2006, respondent did not keep records of when AD nurses took their meal breaks (the "No Records" class) which raised the presumption that no meal breaks were taken during that time period.

In a sur-reply brief and at oral argument respondent argued that the "Early Lunching Class" should not be certified because it was not unlawful to provide employees with the opportunity to take a meal break within the first few hours of an employee's arrival at work, and that there was no common policy requiring the nurses to take their lunches early. With respect to the suggested "No Records Class," respondent asserted at oral argument that, although there were no "electronic records" recording meal breaks during the 2004-2006 time period, paper records did exist showing when the nurses took meal breaks, and that both party's experts had analyzed paper records.

The trial court took the matter under submission after oral argument and subsequently issued an order denying appellants' motion in its entirety. Preliminarily, the court determined that there was not a statutory violation upon which to state a cause of action based on the "timing" of a meal break because the law did not require that meal periods be scheduled during the middle of a shift nor before the fifth hour of work. Secondly, the court denied the motion because "individual issues predominated." The court found the evidence demonstrated the inability to take a meal period was due to the duration of the patient's treatment or the employee's choice regarding scheduling and not the respondent's uniform policy.[2] The court's order did not specifically address the proposed Section 212 Class.

Appellants timely appealed.

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[2] In this regard the court ruled: "Specifically, the evidence, including that from plaintiffs, shows that it has been more likely than not that an employee's inability to take a meal break during five hours of work was due to the particular duration of the patient hemodialysis treatment or the employee's own elected scheduling, and not due to the employer's policies. Employees have been able to plan lunches at the beginning of work, in between setting up machines and treatment, or in between treatments. The times of inability have been mainly due to unexpected durations and complications of a particular instance of patient treatment or elective, preferential planning by employees themselves."

DISCUSSION

Before this court, appellants contend that the lower court improperly denied their class certification motion. Specifically, appellants complain that the lower court erred in denying its "Meal Period Class"—specifically by failing to rule on the their "Auto deduction/unpaid wages claim," and by failing to rule on the "No Records Subclass" presented in their Reply Brief. In addition, appellants assert that remand and reconsideration is appropriate in light of *Brinker, supra,* 53 Cal.4th 1004 in which, according to appellants, the Supreme Court recognized that a legal challenge to employer's written meal policies could be suitable for class treatment. Appellants claim this pronouncement in *Brinker* amounted to an *"*intervening change of law," which they could not have anticipated and would have been rejected by the lower court prior to *Brinker* had they sought to certify a class based on respondent's written meal policies. Finally, appellants also complain that the lower court erred in failing to rule on their request to certify the "Section 212 Class." We address these arguments in turn.

I. General Legal Principles Governing Class Certification

"Originally creatures of equity, class actions have been statutorily embraced by the Legislature whenever 'the question [in a case] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. . . .'" (*Brinker, supra,* 53 Cal.4th at p. 1021; *quoting* Code Civ. Proc., § 382.) The California Supreme Court has articulated clear requirements for the certification of a class: "The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker, supra,* 53 Cal.4th at p. 1021; Code Civ. Proc., § 382.) "In turn, the 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089; quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)

A class action may be maintained even if each member must individually show eligibility for recovery or the amount of damages. But a class action will not be permitted if each member is required to "litigate substantial and numerous factually unique questions before a recovery may be allowed. [Citations.] . . . '[I]f a class action "will splinter into individual trials," common questions do not predominate and litigation of the action in the class format is inappropriate. [Citation.]' [Citations.]" (*Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 732, [order denying certification on misclassification allegations affirmed where trial court found tasks performed by restaurant managers, and time devoted to each task, varied widely from restaurant to restaurant].)

Here, the element of class suitability in dispute is whether individual questions or questions of common or general interest predominate. (See, *Brinker, supra*, 53 Cal.4th at p. 1021.) The "ultimate question" the element of predominance presents is whether "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Ibid.*, quoting *Collins v. Rocha* (1972) 7 Cal.3d 232, 238, accord, *Sav–On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).) This question can be answered by determining whether the theory of recovery advanced by the proponents of certification is "likely to prove amenable to class treatment" and whether the legal and factual issues the proponents present should be resolved in a single class proceeding. (*Brinker, supra*, 53 Cal.4th at pp. 1021-1022; *Sav-On, supra*, 34 Cal.4th at p. 327.) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916; accord, *Brinker, supra*, 53 Cal.4th at p. 1022.)

Finally, in *Brinker* the court recognized that although in general class certification issues are procedural that do not ask whether an action is legally or factually meritorious, issues affecting the merits of a case may be enmeshed with class action requirements. (*Brinker, supra*, 53 Cal.4th at pp. 1022-1024; see also *Wal–Mart Stores, Inc. v. Dukes* (2011) 564 U.S. ___, ___, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 [analysis of a class certification's propriety "[f]requently . . . will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."]; *Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463, 469, fn. 12 ["'Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims.'"].) "When evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them." (*Brinker, supra*, 53 Cal.4th at p. 1024.) Such a "peek" into the merits is particularly appropriate when the court is attempting to determine whether common or individual issues predominate. (*Ibid.* ["In particular, whether common or individual questions predominate will often depend upon resolution of issues closely tied to the merits"].)

II. Standard of Review

Our review of the denial of a class certification order is narrowly circumscribed. (*Brinker, supra*, 53 Cal.4th at p. 1022.) "The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: 'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.' [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]" (*Fireside Bank v. Superior Court, supra*, 40 Cal.4th at p. 1089; accord, *Brinker, supra,* 53 Cal.4th at p. 1022; see also, *Hamwi v. Citinational–Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 472 ["So long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld."].)

California courts consider "pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." (*Sav–On, supra*, 34 Cal.4th at p. 333.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1298, quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

The trial court's finding that common issues predominate generally is reviewed for substantial evidence. (*Brinker, supra*, 53 Cal.4th at p. 1022; *Sav–On, supra*, 34 Cal.4th at pp. 328–329.) '"The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: 'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting *or denying* certification.' [Citations omitted; emphasis added.]" (*Brinker, supra*, 53 Cal.4th at p. 1022.) Appellate courts presume "in favor of the certification order . . . the existence of every fact the trial court could reasonably deduce from the record. . . ." (*Sav–On, supra*, 34 Cal.4th at p. 329; *Brinker, supra*, 53 Cal.4th at p. 1022.)

III. Appellants' Claims

A. Meal Period Class Issues

Appellants contend that the lower court erred in denying certification for its proposed "Meal Period Class" because the trial court's determination that "individual questions predominated" was not supported by substantial evidence. They contend that the trial court did not address their claims and evidence of Auto-deduction/unpaid wages and therefore the court abused its discretion by denying class certification.

Below, appellants claimed that respondent had a common policy of understaffing, which prevented AD nurses from taking meal breaks; that respondent imposed automatic pay deductions for meal periods, and that as a result they failed to pay overtime wages for AD nurses who did not take meal breaks. They supported these claims with expert testimony and declarations from the nurses. However, respondent presented evidence at the certification hearing countering appellants' evidence and claims. Respondent provided evidence that there was no common company-wide policy to auto-deduct wages and that any such automatic deductions related to meal breaks was limited to one hospital and for a limited time period. Further, respondent provided declarations and time cards from nurses indicating that nurses across the entire class were consistently able to take meal breaks. Lastly, respondent provided evidence that it had no understaffing policy and had a disincentive to understaff nurses. The lower court found that respondent did not have any company wide, uniform policies that prevented AD nurses from taking lawful breaks and therefore the decision to take a meal break, or not take a meal break, was made by individual nurses depending on their patient situation and case load. The court found that individual questions predominate the claims.

The court's resolution is supported by the evidence in the record before us. Given the variances in the declarations and deposition testimony, appellants failed to demonstrate a common practice or policy preventing AD nurses from taking meal breaks. (E.g., *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1350 ["When variations in proof of harm require individualized evidence, the requisite community of interest is missing and class certification is improper"]; compare with *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207, 1208 [certification appropriate where employer had policy of prohibiting certain employees from taking breaks].) Accordingly, this evidence supports the trial court's determination that "individual questions predominate" and, thus, will not be disturbed on appeal. (See *Brinker*, *supra*, 53 Cal.4th at p. 1052 [Affirming appellate court's order vacating certification of an "off-the-clock" subclass, were the record lacked common proof, or evidence of an uniform policy or practice. "Instead, the trial court was presented with anecdotal evidence of a handful of

individual instances in which employees worked off the clock, with or without knowledge or awareness by Brinker supervisors. On a record such as this, where no substantial evidence points to a uniform, companywide policy, proof of off-the-clock liability would have had to continue in an employee-by-employee fashion. . . ."].)

In addition, appellants' chronic understaffing theory has been rejected in the past. (See *Brown v. Federal Express* (C.D.Cal.2008) 249 F.R.D. 580, 582-587.) The focus in *Brown* was on scheduling and staffing constraints alleged to have effectively deprived drivers of the opportunity to take code-compliant meal breaks. (See, e.g., *id*. at 582-583 [citing plaintiffs' contentions that defendant "was committed to making a large number of deliveries on time and devoted insufficient resources to this task. As a result, [drivers] were put under excessive pressure to make deliveries as quickly as possible, such that they were unable to take meal breaks and rest breaks within the time required by law." (Internal citations to record omitted)]; *id*. at p. 586 [explaining that the plaintiffs' job duties "var[ied] significantly by job classification" and that "[a]lthough FedEx may have consistent policies that apply across job classifications, their impact on employees' ability to take breaks necessarily depends on each individual's job duties. Analysis of whether drivers' job duties precluded taking meal and rest breaks would vary widely among Couriers"].) Here, appellants were not able to show that the respondent had a "pervasive understaffing policy" and only presented evidence that AD nurses had limited times during AD sessions when they could take their breaks because of their various job duties dealing with each patient.

Moreover, although the court's order does not specifically address the "Auto deduction/unpaid wages claim," as alleged, that claim was derivative of appellants' broader claim that AD nurses were not afforded meal breaks. Indeed, in concluding that individual issues predominated because there was no evidence of a common policy denying meal breaks, the lower court found that an individual determination would be required of each member of the class to determine which nurses took meal breaks, which did not, and whether those who did not were subject to an automatic deduction or were entitled to overtime or unpaid wages. Indeed, respondent presented evidence that "auto-

deduction" was not an issue common to the class appellants' sought to certify, was not done pursuant to a company-wide policy and limited to only one hospital.

In sum, based on the evidence presented at trial, and the deference we give to the court's factual findings, we affirm the denial of certification of the "Meal Period Class." (*Brinker, supra,* 53 Cal.4th at p. 1022 ["Trial courts are ideally situated to evaluate the efficiencies and practicalities of class certification and are therefore afforded great discretion in granting or denying certification."].)

B. No Records Sub-Class

Appellants further contend that the trial court had an obligation to consider a "No Record Subclass."

The Supreme Court has "'urged trial courts to be procedurally innovative' [citation] in managing class actions, and 'the trial court has an obligation to consider the use of . . . innovative procedural tools proposed by a party to certify a manageable class' [citations]." (*Sav–On, supra,* 34 Cal.4th at p. 339, fn. omitted.) Nonetheless, while a court may create subclasses, it is not required to do so. (See *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639, 662 [concluding that lower court did not err in failing to recognize subclasses plaintiffs suggested for the first time their reply brief (to the motion for class certification) because plaintiffs failed to provide any meaningful solution to the manageability concerns raised by the lack commonality].)

In their reply brief filed in support of their motion, appellants argued that the trial court should certify a "subclass" of plaintiffs covering the time period between April 1, 2004 and October 1, 2006, because during that time period respondent did not keep accurate time records reflecting meal breaks. Appellants claimed that during that time period only total daily hours were recorded electronically and there was no punch-in punch-out data recorded for the meal periods. Respondent contested this claim at oral argument pointing out that although there were no "electronic records" showing meal breaks during the 2004-2006 time period, paper records did exist showing when the nurses took meal breaks, and that both party's experts had analyzed the paper records.

We find no error with regard to the "No Records Subclass." Appellants did not demonstrate that there was a common policy or common issues of proof to support this subclass. Respondent asserted that written (i.e., non-electronic) records were maintained to show meal breaks taken by the nurses during this period. In any event it is unclear how certifying a "No Records Subclass" would have provided any substantial benefits that rendered class treatment superior to the alternatives. Appellants have not articulated how a failure to keep electronic records of meal breaks prevented employees from taking those meal breaks or that respondent had a policy or practice of denying meal periods. Moreover, appellants did not show how the use of this subclass would resolve problems which plagued the larger class—that individual issues predominated—that individual AD nurses took their meal breaks at various times during their respective shifts and that uniform policies were not responsible for an employee's failure to take a meal break. Therefore, the creation of a subclass would not have been an effective procedural tool to create a manageable class and therefore the court did not err in failing to certify a "No Records Subclass."

C. The Application of *Brinker*

Appellants seek to assert a "new" legal theory to support the "Meal Period Class" certification. Appellants argue that had the *Brinker* decision existed prior to the hearing on the class certification motion, they would have focused on respondent's "facially unlawful written meal written period policies." They concede that this issue was not raised at the trial level, but seek to raise this issue here on appeal based on their view that *Brinker* established new law on this issue.

Traditionally, a party may not raise a new contention on appeal. However, a court may refuse to follow the doctrine where, after trial, there is a change in judicially declared law that validates a theory that would have been rejected if presented under the case law as it existed at the time of trial. (9 Witkin, Cal. Proc. 5th (2008) Appeal, § 414, p. 472; see, *In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1227; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654, fn. 3; ["It is well settled that a court will consider on appeal a new point of law decided while the appeal is pending"].)

Ultimately, however, application of the rule is discretionary with the reviewing court. (*In re Marriage of Moschetta, supra,* 25 Cal.App.4th at p. 1227.)

We will not exercise our discretion in this case because appellants have not shown that their new theory of law "would have been rejected if presented under the case law as it existed at the time of trial." (*In re Marriage of Moschetta, supra,* 25 Cal.App.4th at p. 1227, fn. 12; quoting Witkin, Cal. Proc. (3d ed. 1985) Appeal, § 322, p. 333; accord, 9 Witkin, Cal. Proc. 5th, *supra,* Appeal, § 414, p. 472.) Appellants claim that had they known that *Brinker* would hold that a uniform policy is "by its nature a common question eminently suited for class treatment," appellants would have raised this issue at the trial level.

We disagree with appellants that this aspect of the *Brinker* opinion presented new or an intervening change in law.[3] *Brinker*'s determination that a uniform meal policy presents a common question suitable for class treatment is a legal theory that was articulated in the case law and recognized by the appellate courts well prior to the *Brinker* decision. For example in *Jaimez v. DAIOHS USA, Inc., supra,* 181 Cal.App.4th 1286, the court held that a uniform class wide policy and practice of misclassifying employees was a predominate factual issue which was amenable for class treatment. (*Id.* at pp. 1302-1303.) Additionally, in *Sav-on, supra,* 34 Cal.4th 319, the Supreme Court held that a "class wide policy" by the defendant supported the predominance of commonality. (*Id.* at p. 332.) Furthermore, the *Brinker* opinion itself recognized that issues related to a

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3 *Brinker* did clarify the law, however, in a number of other respects relevant to this case, including holding that as a matter of law an employer is not required to provide a meal in the middle of a shift and therefore a meal break taken during the first hour of a shift is not unlawful. (See, *Brinker, supra*, 53 Cal.4th at p. 1041 ["We conclude that, absent waiver, section 512 requires a first meal period no later than the end of an employee's fifth hour of work, and . . . Wage Order No. 5 does not impose additional timing requirements."].) We note that appellants do not contest the lower court's refusal to certify the proposed "Early Lunching Class."

uniform policy are a well-established means to show that an action is suited for class treatment:

> "Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort *routinely, and properly, found suitable for class treatment*. (See, e.g., *Jaimez v. DAIOHS USA, Inc., supra,* 181 Cal.App.4th at pp. 1299–1305, 105 Cal.Rptr.3d 443; *Ghazaryan v. Diva Limousine, Ltd., supra,* 169 Cal.App.4th at pp. 1533–1538, 87 Cal.Rptr.3d 518; *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1205–1208, 76 Cal.Rptr.3d 804.)" (*Brinker, supra,* 53 Cal.4th at p. 1033, emphasis added.)

Uniform policies have been used to support class treatment consistently in the past prior to *Brinker*, and, thus, appellants cannot claim that *Brinker* brought about a new law at this stage of appeal. To the extent the Appellants wanted to rely on this legal theory to support their proposed class, they had ample opportunity to present it in the trial court when they originally sought certification. Accordingly, this court will not exercise its discretion and address this "new" theory in this appeal.

D. Section 212 Class

Appellants contend that the lower court erred by failing to rule on the certification of the "Section 212 Class." We agree.

An order based upon improper criteria or incorrect assumptions calls for reversal "'even though there may be substantial evidence to support the court's order.' [Citations.]" (*Linder v. Thrifty Oil Co., supra,* 23 Cal.4th at pp. 435-436; accord, *Sav–On Drug Stores, supra,* 34 Cal.4th at pp. 326–327.) "If the trial court failed to follow the correct legal analysis when deciding whether to certify a class action, 'an appellate court is required to reverse an order denying class certification. . . , "even though there may be substantial evidence to support the court's order."' [Citations.] In other words, we review only the reasons given by the trial court for denial of class certification, and ignore any other grounds that might support denial." (*Bartold v. Glendale Federal Bank*

(2000) 81 Cal.App.4th 816, 828-829; accord, *In re Lamps Plus*, *supra*, 209 Cal.App.4th at p. 47.)

As explained elsewhere here, the "No Records Subclass" and the "Auto deduction/unpaid wages claim" were inextricably linked to the "Meal Period Class," were addressed during oral argument and were implicitly resolved in the lower court's order. In contrast, the "Section 212 Class" is factually and analytically distinct from the meal period claims and proposed classes. It relates to the manner in which paychecks were issued to employees.

Respondent argued in its brief and at oral argument that the statement in the court's order that "individual issues predominate" reflects the court's ruling on the "Meal Period Class" *and* the "Section 212 Class." The court's order, however, does not support respondent's interpretation. Indeed, the court's statement that "individual issues predominate" appears in the written order in the *middle* of the court's discussion of its ruling on the "Meal Period Class." The court's order does not contain any mention of the "Section 212 Class." Nothing in the court's order denying the class certification motion expressly nor implicitly addresses whether alleged violations of Labor Code section 212 would be suitable for class treatment in this case. Thus, it would not be reasonable for this court to infer that the trial court's analysis of the "Meal Period Class" applies to the "Section 212 Class." Moreover, other than a passing mention of the "Section 212 Class" by respondent's counsel at oral argument at the hearing on the motion, neither parties nor the court addressed the merits of certifying the "Section 212 Class" at the hearing. In our view, the "Section 212 Class" appears to have been excluded from the court's class certification determination.

In light of the foregoing, we cannot find that the court exercised its discretion in denying class certification of the "Section 212 Class" and the matter must be remanded to the lower court to consider it.

DISPOSITION

The order is reversed and the matter is remanded to the trial court to consider whether the "Section 212 Class" warrants class certification. The order is affirmed in all other respects. Each party is to pay its own costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**